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NO. 02-1553

IN THE

Supreme Court of the United States

PHILIP MORRIS USA INC.,

Petitioner,

v.

MAYOLA WILLIAMS,

Respondent.

On Petition for a Writ of Certiorari to the Oregon Court of Appeals

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a punitive damages judgment of $79.5 million in a case involving the death of a plaintiff, resulting from a 40-year campaign of misrepresentation about the health hazards of tobacco use, is unconstitutionally excessive under *State Farm Mut. Automobile Ins. Co. v. Campbell*, 538 U.S. ___, 123 S. Ct. 1513 (2003), and *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996).

2. Whether, pursuant to *State Farm* and *BMW*, Petitioner had a constitutional right to have the jury instructed that any punitive damages award must be reasonably related to the harm to the plaintiff.

3. Whether Oregon's "rational juror" standard for the review of punitive damages awards is unconstitutional under *State Farm*, *BMW*, and *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001).

4. Whether a state law tort claim for misrepresentation is foreclosed by the preemption provision of the Federal Cigarette Labeling and Advertising Act.

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BRIEF FOR RESPONDENTS IN OPPOSITION

STATEMENT OF THE CASE

Petitioner Philip Morris engaged in one of the longest running, most profitable, and deadliest frauds in history. Jesse Williams died as a result of Philip Morris's lethal fraud, along with approximately 400,000 fellow Americans who die as a result of tobacco usage each year. Tr. Vol. 9-B at 138, Vol. 11-B at 41; Ex. 159. By 1997, when Jesse Williams drowned in his own blood after losing his battle with lung cancer, Philip Morris had known for at least 40 years that cigarettes cause lung cancer and that millions of American smokers, about half of whom were its customers, were addicted to the nicotine in cigarettes. Pet. at 14a, 14a n.12; Tr. Vol. 12-B at 91-92, 9-A at 131-40, 11-A at 61-63; Ex. 50 at 1, 36 at 2. In an effort to maximize profit, Philip Morris either denied this knowledge outright, saying more research was needed, or disingenuously reassured its customers it would never jeopardize their health. Pet. at 12a-14a.

In 1952, *Reader's Digest* published an influential article on research findings that linked smoking with cancer. The article is credited with causing cigarette sales to fall for the first time in the twentieth century. Tr. Vol. 7-A at 109-10. To counter this trend, Philip Morris designed an elaborate public relations campaign to ensure that people continued to buy and smoke cigarettes. Pet. at 13a-14a. This campaign began with the publication of "A Frank Statement to Cigarette Smokers." Pet. at 13a. The "Frank Statement," which first appeared as an advertisement in major newspapers throughout the United States, stated that cigarettes were not injurious to a person's health and that their customers' health was a "basic responsibility, paramount to every other concern in our business." *Id.*; Ex. 7 at 2. The "Frank Statement" also announced the establishment of the Tobacco Industry Research Committee (TIRC) to conduct research into "all phases of tobacco and health." Pet. at 13a.

This document was the beginning of Philip Morris's "common front" approach to the relationship between smoking and health. Pet. at 13a. Over the next decade, similar statements were broadcast to the public including that Philip Morris would "stop business tomorrow" if it thought that its product was harming smokers, and that "there was no connection" between smoking and disease or Philip Morris "wouldn't be in the business." Pet. at 14a; Ex. 10, 11, 47, 161 at 1. At the same time it made these statements, Philip Morris knew that "[s]moking causes lung cancer." Ex. 28 at 2, 32 at 1, Tr. Vol. 11-A at 62-63.

In response to the 1964 Surgeon General's Report that smoking contributed substantially to mortality rates from lung cancer and other diseases, a Philip Morris vice president wrote an internal memorandum that stated "we must, on a future basis, give smokers a psychological crutch and self-rationale to continue smoking." Pet. at 14a. Thereafter, the self-described "brilliantly conceived and executed" public relations strategy to "defend itself" in "litigation, politics, and public opinion" was altered from the "vigorous denial" approach to a "counter propaganda" plan. Ex. 80 at 7-8, 83 at 1. In short, the new plan was designed to suggest "ready-made credible alternatives" to the idea that smoking causes disease, while still insisting that there was "no proof that smoking causes cancer." Pet. at 14a. It is a position Philip Morris maintained throughout the 1970s, 1980s, and 1990s. *Id.* This campaign of misinformation allowed people to rationalize their continued use of cigarettes. Ex. 50, 161 at 1, 175.

The "counter propaganda" was not limited to the relationship between smoking and health. Ex. 36 at 2, 106. Publicly, until 1994, Philip Morris also continued to deny that the nicotine in cigarettes was addictive. Ex. 148. Privately, Philip Morris concluded that "no other rationale is adequate to sustain the habit [of smoking] in the absence of nicotine." Ex. 72 at 2. The research

director of Philip Morris described the company's understanding best by stating that "I think the thing that we sell most is nicotine." Ex. 109 at 1. Yet, the addictive properties of nicotine remained secret because "the entire matter of addiction is the most potent weapon a prosecuting attorney can have in the lung cancer/cigarette debate. We can't defend continued smoking as 'free choice' if the person was 'addicted.'" Ex. 110 at 2.

To increase cigarette sales, Philip Morris dedicated years of study to the role of nicotine addiction in smoking. Ex. 39, 44 at 1, 53 at 1, 58 at 1, 91 at 2. Specifically, Philip Morris used data that suggested that "a smoker [has] daily intake quotas for tar and/or nicotine" to its financial advantage by introducing lower tar and nicotine cigarettes. Ex. 57 at 1, 134 at 1, 139 at 1. As smokers switched to lower tar and nicotine cigarettes, they increased their cigarette consumption to maintain their nicotine intake. Ex. 57 at 1.

Philip Morris's long standing fraudulent scheme was very successful. The company shipped 235 billion cigarettes and made a net profit of $1.6 billion the year that Jesse Williams died. Pet. at 26a; Tr. Vol. 14-A at 49-50, 55. In 1996, when Jesse Williams was diagnosed with lung cancer, Philip Morris made a net profit of $2 billion. *Id.* at 58. At the time of Jesse Williams's posthumous trial, Philip Morris had a net worth of more than $17 billion and a 51 percent domestic market share. Pet. at 26a; Tr. Vol. 14-A at 57.

Jesse Williams received and relied upon Philip Morris's false statements made on television and through the print media. Tr. Vol. 12-B at 49-50, 80. It is known that Jesse Williams believed these messages because he told his wife that tobacco companies would not sell a product that caused cancer "because a tobacco company just would not do that." Tr. Vol. 12-B at 41. Moreover, as recently as 1994, Philip Morris published advertisements called "Facts You Should Know" in newspapers, including

the Portland *Oregonian*. Ex. 148. Among other things, the advertisements claimed that nicotine was not addictive. *Id.* Mr. Williams read the *Oregonian* and was generally a well-read person who liked to keep up with current events. Tr. Vol. 15-B at 130, 147-48, 15-A at 55.

Mr. Williams tried a number of times to stop smoking, but as he was "highly addicted," those efforts were unsuccessful. Tr. Vol. 4-B at 20, 12-B at 46-47, 51-52, 71-73. After being diagnosed with lung cancer, Jesse Williams told his wife that the "cigarette people" had "deceived" him, that he felt betrayed, and that "they were lying all the time." Tr. Vol. 12-B at 85. After his death, his widow filed this lawsuit to "make a difference for people that had been denied the evidence that cigarettes could harm them" and "let other people know that they were being deceived." *Id.* at 93-94. The evidence led to a finding that Philip Morris purposefully misrepresented known facts. Pet. at 11a-12a. Philip Morris acknowledged that Jesse Williams relied upon its messages when, in lower court briefing, it argued that the record contained evidence that he "clung to Philip Morris' few public statements related to smoking and cancer." Defendant's Reply Br. in Or. Court of Appeals, at 13.

During the 1999 trial, the court told counsel that the jury would be instructed that, pursuant to the prayer for relief, punitive damages would be limited to $100 million. Defense counsel told the court that this was "okay." Tr. Vol. 22-C at 87, 25 at 64. In addition, Philip Morris sought a jury instruction that stated, among other things, that the punitive damage award must bear a reasonable relationship to the compensatory damages and that "you may consider the extent of harm suffered by others" in determining punitive damages. Pet. at 3; Defendant's Reply and Cross Responding Br. in Or. Court of Appeals, at 37. However, much of this proposed instruction was contrary to Oregon state law, and the trial judge refused the instruction. Pet. at 22a-23a. The jury was instructed that only in-state conduct could be punished when

assessing punitive damages and the judge explicitly went through the six relevant Oregon punitive damage factors to consider under ORS § 30.925. Tr. Vol. 25 at 49-51.

On March 30, 1999, the jury rendered its verdict. J. at 1. The jury found Philip Morris liable on a claim of negligence but also found Jesse Williams was 50 percent negligent. The jury also found Philip Morris liable for misrepresentation. It awarded $21,485.80 in economic and $800,000.00 in non-economic damages for each claim.[1] The jury declined to award punitive damages on the negligence count. With regard to the misrepresentation claim, the jury specifically found that "defendant ma[d]e false representations concerning the causal link between smoking and cancer upon which Jesse Williams relied" and that "such false representations and reliance [were] a cause of damage to plaintiff, as to cigarettes sold to Jesse Williams on or after September 1, 1988." J. at 3-4. The jury then awarded $79.5 million in punitive damages. *Id.* Upon Philip Morris's Motion for a Reduction of Punitive Damages, the trial court found the punitive damage award to be within the range that a rational juror could assess "based upon the record as a whole and applying Oregon, common law and statutory factors" but still reduced it to $32,000,000 in accordance with perceived "federal standards." Pet. at 4; Appellant's Br. in Or. Court of Appeals, at 39-40.

Both parties appealed. The Court of Appeals upheld the finding of fraud. It held that the evidence would permit the jury to find that Philip Morris affirmatively misrepresented that smoking was not harmful to a person's health and that it intended Mr. Williams and other Oregon smokers to rely on this misrepresentation. Pet. at 3a-17a. Further, the Court found that a number of Mr. Williams's statements constituted direct evidence

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[1] A statutory cap on noneconomic damages reduced the jury's $800,000 verdict to $500,000. Pet. at 2a, citing ORS § 18.560(1).

that Mr. Williams received and relied upon defendant's misrepresentations. Pet. at 17a.

The court reviewed the Petitioner's excessiveness argument *de novo* under both the applicable state statutory criteria, ORS § 30.925, and the *BMW* guideposts. Pet. at 18a-33a. Among other things, the Court found there was evidence for a jury to find that: Philip Morris knew smoking had serious health consequences and actively misrepresented this information; was aware of the likelihood of the harm that this decision would cause; believed that continued misrepresentations were important to its ability to make billions of dollars in profit; and engaged in actions that not only "caused a significant number of deaths each year in Oregon during the pertinent time period," but also caused "other serious but nonfatal health problems with their attendant economic consequences." *Id.* at 23a-26a.

The court then addressed each *BMW* factor in turn. With regard to the reprehensibility factor, the Court found the behavior to be particularly egregious in this case because Philip Morris sought to make large amounts of money by engaging in a fraudulent scheme, over a period of four decades, to induce people to use or continue to smoke cigarettes despite the fact that smoking would cause serious illness or death in a significant percentage of people. *Id.* at 28a-29a. When addressing the ratio between punitive and compensatory damages, the court found that the ratio to potential harm was not one that "raises our judicial eyebrows" and amounted "to little more than two and a half weeks' profit." *Id.* at 30a-31a.

Finally, as to *BMW* comparability, the court found that the "established law of punitive damages . . . was sufficient to alert the defendant to the possible punishment for its fraudulent scheme." Pet. at 32a. Petitioner then sought further review in the Oregon Supreme Court, which denied the petition. Pet. at 40a.

REASONS FOR DENYING THE PETITION

I. THE RULING BELOW ON PUNITIVE DAMAGES IS CONSISTENT WITH THIS COURT'S DECISION IN *STATE FARM*

A. A GVR Is Not Appropriate Where this Court's Intervening Decision Did Not Create New Law

Petitioner asks this Court to vacate the lower court's decision as "directly conflicting" with *State Farm Mut. Automobile Ins. Co. v. Campbell*, 538 U.S. ___, 123 S. Ct. 1513 (2003), and to remand for consideration in light of that decision. Pet. at 6.[2]

The request is inappropriate. This Court in *State Farm* established no new constitutional limitations on punitive damage verdicts. Rather, the Court found the excessiveness issue in State Farm "neither close nor difficult" while applying the well-established "principles set forth in *BMW of North America, Inc. v. Gore*, [517 U.S. 559 (1996)]." 123 S. Ct. at 1521. The Oregon Court of Appeals faithfully applied the very same principles in reviewing the punitive damage verdict. Although Petitioner disagrees with the Oregon court's application of the *BMW* principles to the facts of this case, that disagreement is neither justification for this Court to vacate and remand in order to require the Oregon court to decide the matter yet again, nor is that justification for what amounts to supervisory review of state court decision-making through the certiorari process.

In both civil and criminal cases, "a GVR order both promotes fairness and respects the dignity of the [lower court] by enabling it to consider potentially relevant decisions and arguments that were not previously before

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[2] Petitioner asks the Court for GVR with respect to its Questions Presented 1, 2 and 3. Pet. at 6-7, 9, 11, and 15. As to Question 4, dealing with an issue of federal preemption that was not present in *State Farm*, Petitioner presumably seeks plenary review.

it." *Stutson v. United States*, 516 U.S. 193, 197 (1996). Members of this Court "all are agreed that our GVR power should be exercised sparingly," mindful of "[r]espect for lower courts, the public interest in finality of judgments, and concern about our own expanding certiorari docket." *Lawrence v. Chater*, 516 U.S. 163, 173 (1996).

Because *State Farm* announced no new principles or guideposts but merely applied those established in *BMW*, which is precisely what the Oregon court did as well, remand cannot be justified and would serve only to delay justice further for the family of Jesse Williams, to the advantage of Petitioner. It would impose upon the Oregon court the burden of conducting further proceedings to consider issues already briefed, argued and resolved.

Additionally, a GVR in this case would add to this Court's expanding certiorari docket, essentially inviting every unhappy punitive damage defendant to petition for certiorari as a matter of course. It is worth noting that, in a large percentage of punitive damage awards, the parties settle post-trial or during the appeals process for amounts that are less than the judgment. Michael L. Rustad, *Unraveling Punitive Damages: Current Data and Further Inquiry*, 1998 WIS. L. REV. 15, 42-43. Raising expectations that full review or GVR is freely ordered by this Court in punitive damage cases will lead to the unintended consequence of discouraging such post-trial settlements.

That such petitions could become standard operating procedure by defendants is not a time-limited concern. Petitions for certiorari raising issues of constitutional excessiveness are regularly filed with this Court. Dissatisfaction with a state court's application of *BMW*, however, should not occasion a petition for certiorari. Nor should a new intervening decision of this Court that merely applies existing law. Sufficient safeguards exist in the state court systems without the need for yet another review of a verdict already confirmed by *de novo* review.

Compare TXO Production Corp. v. Alliance Resource Corp., 509 U.S. 443, 457 (1993)("Assuming that fair procedures were followed, a judgment . . . is entitled to a strong presumption of validity.").

In sum, this is a case in which "the delay and further cost entailed in a remand are not justified by the potential benefits of further consideration by the lower court," so that a GVR order is inappropriate. *Lawrence*, 516 U.S. at 168.

B. The Oregon Court's Application of the "Reprehensibility" Guidepost Does Not Conflict With *State Farm*

1. *Petitioner Does Not Dispute the Strong State Interest in Punishing and Deterring Philip Morris's Life-Threatening Misconduct*

In *State Farm*, this Court reaffirmed that "each award must comport with the principles set forth in [*BMW v.*] *Gore*." 123 S. Ct. at 1525. The purpose of the *BMW* "guideposts" is to insure "adequate notice of the magnitude of the sanction that [a state] might impose." *BMW*, 517 U.S. at 574. As stated and applied by the Court in *State Farm*, the guideposts are:

> (1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.

123 S. Ct. at 1520. *See also BMW*, 517 U.S. at 575.

In its effort to portray the Oregon court's opinion as in conflict with *State Farm*, Petitioner ignores most of the *BMW* principles and attempts to rewrite this Court's *State Farm* opinion to hold that the ratio of punitive damages to compensatory damages is the conclusive and overriding test of excessiveness.

Petitioner, for example, ignores this Court's admonition that an award can only be fairly characterized as "grossly excessive" by viewing it in relation to the State's "legitimate interests in punishing unlawful conduct and deterring its repetition." *State Farm* at 1519, quoting *BMW*, 517 U.S. at 568. "For that reason, the federal excessiveness inquiry appropriately begins with an identification of the state interests that a punitive award is designed to serve." *Id.* There can be no disagreement regarding the strong interest of Oregon to punish and deter fraudulent misrepresentations, motivated by financial gain, with respect to consumer products that place its consumers at risk of serious injury or death for profit.

2. Petitioner Does Not Dispute the Court's Conclusion that Philip Morris's Misconduct Was Highly Reprehensible

"The most important indicium of the reasonableness of a punitive damages award," this Court said, "is the degree of reprehensibility of the defendant's conduct." *State Farm*, 123 U.S. at 1521, quoting *BMW*, 517 U.S. at 575. Courts are to "determine the reprehensibility of a defendant by considering" five factors:

> [W]hether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident.

Id. at 1521, citing *BMW*, 517 U.S. at 576-577.

Each of these aggravating factors supports the substantial award of punitive damages in this case. In fact, the evidence in this case points to a record of reprehensibility that is unique in American history. Philip Morris is a company worth $17 billion, built on

sales of cigarettes, which in 1997 alone brought in profits of $1.6 billion.[3] Amazingly, Petitioner reaped these profits from selling a product that it knew would kill many of its own customers — not through misadventure or accident, but, as Petitioner admits, when "used as defendant *intended* them to be used." Pet. at 8 (emphasis added). The crux of this case is Petitioner's purposeful misrepresentation of this knowledge.

The numbers are staggering. Philip Morris cigarettes kill an estimated 200,000 Americans each year.[4] No other product sold in the U.S. kills as many as one in ten of its regular users.[5] How — especially in our increasingly health-conscious society — has Philip Morris managed to keep its customers smoking? One strategy, which lies at the heart of plaintiff's evidence in this case, has been a deadly, decades-long, fraudulent scheme to misrepresent the scientific facts about the risks of smoking and to exploit the addictive nature of nicotine. Starting in the early 1950s, as evidence linking cigarettes and cancer began to depress tobacco company profits, Petitioner and others in the industry devised a joint scheme to take advantage of the vulnerability of the class of addicted consumers they had created. They issued misrepresentations well into the 1990s that whether smoking causes disease is a matter of dispute among scientists and an open question that required further study. Petitioner knew not only that these statements aimed at smokers like Jesse Williams were false, but also

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[3] The company shipped 235 billion cigarettes and made a net profit of $1,607,000,000 in 1997, the year that Jesse Williams died. Tr. Vol. 14-A at 49-50, 55.

[4] The evidence was that cigarette smoking kills more than 400,000 Americans each year. Tr. Vol. 9-B at 138, Vol. 11-B at 41. Evidence showed that Philip Morris has approximately 51% of the domestic cigarette market. Tr. Vol. 14-A at 57.

[5] The jury, however, only considered the impact on smokers in Oregon, as it was instructed by the trial court.

that addicted smokers like Jesse Williams would cling to such statements to rationalize their smoking and avoid the difficult ordeal of quitting, which their addictions made even more arduous.

As the Oregon Court of Appeals summarized the evidence in the record, Philip Morris "sought to make large amounts of money by engaging for more than four decades in a fraudulent scheme to induce people to use or continue to use a product that could cause serious illness or death." Pet. at 28a-29a.

3. The Fact that Philip Morris's Misconduct "Caused a Significant Number of Deaths" Was Relevant to Reprehensibility

Petitioner makes no assignment of error regarding the lower court's legal standard of reprehensibility, its application of the five factors outlined in *State Farm*, or the court's conclusion that Philip Morris's misconduct was highly reprehensible. Instead, Petitioner focuses almost entirely on what it characterizes as the "hypothetical" claims of "past, present and future customers." Pet. at 7. The record evidence, not as a matter of conjecture but fact, established that defendant's products "caused a significant number of deaths each year in Oregon." *Id.* at 26a.

Such an acknowledgment by the court of appeals does not run afoul of this Court's holding in *State Farm*, despite Petitioner's assertion. *Id.* at 7. *State Farm* condemned consideration of a "defendant's *dissimilar* acts, independent from the acts upon which liability was premised, [and which] may not serve as the basis for punitive damages." 123 S. Ct. at 1523 (emphasis added). By contrast, the death of other smokers in Oregon was the consequence of the very same fraudulent misrepresentations alleged by plaintiff. The *State Farm* Court made clear that "conduct by [defendant] *similar* to that which harmed [plaintiffs]" is relevant to reprehensibility. *Id.* at 1524 (emphasis added). Indeed,

this Court has consistently stated that "repeated misconduct is more reprehensible than an individual instance of malfeasance," *Id.* at 1523, quoting *BMW*, 517 U.S. at 577. This Court added that "courts should look to 'the existence and frequency of similar past conduct'" in evaluating reprehensibility. *Id.*, quoting *TXO*, 509 U.S. at 462 n.28 and *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 21-22 (1991).

The Oregon court properly considered the harm to other smokers resulting from Philip Morris's misrepresentations to show what this Court subsequently called the degree of a defendant's "indifference to or a reckless disregard of the health or safety of others." *Id.* at 1521. Indeed, the *State Farm* Court added that out-of-state conduct, if similar to that directed at plaintiffs, would also be relevant to reprehensibility. *Id.* at 1525.

Second, Petitioner makes the specious assertion that the award punishes its "entirely lawful" conduct in manufacturing and marketing cigarettes. In doing so, Petitioner challenges its exposure to "liability of any sort" for making and marketing cigarettes, even though they are dangerous and cause "a significant number of deaths." Pet. at 7-8.

The fallacy of this argument is that Philip Morris was not held liable for selling cigarettes, but for making fraudulent misrepresentations about their safety. Such conduct is not lawful in Oregon or, for that matter, in any state. *See generally*, RESTATEMENT OF TORTS (SECOND) § 402B (1965)("One engaged in the business of selling chattels who . . . makes to the public a misrepresentation of a material fact concerning the character or quality of a chattel sold by him is subject to liability for physical harm to a consumer of the chattel caused by justifiable reliance upon the misrepresentation.").

Finally, there is no merit to Petitioner's argument that it was "legally irrelevant" that Petitioner's fraudulent statements "caused a significant number of

deaths each year in Oregon." Pet. at 8. As detailed above, this Court in *State Farm* made clear that such evidence of repeated or similar misconduct resulting in harm to others *is relevant* to reprehensibility. 123 S. Ct. at 1523-24.

In conclusion, the harm caused by Petitioner "was physical as opposed to economic," "evinced . . . a reckless disregard of the health or safety of others," targeted "financial[ly] vulnerabl[e]" people, "involved repeated actions" over the course of four decades, and was the product of "trickery, or deceit." *Compare id.* at 1521. All of the potential elements this Court identified as establishing reprehensibility were present.

C. The Oregon Court's Application of the "Ratio" Guidepost Does Not Conflict with *State Farm* and Does Not Require a Jury Instruction on Relationship to Harm

1. State Farm Does Not Hold that High Ratios Are Presumptively Unconstitutional

Philip Morris would like this Court's opinion in *State Farm* to read that a ratio of punitive to compensatory damages in excess of single digits is "presumptively unconstitutional." Pet. at 6. It does not. To the contrary, the Court reiterated:

> "'[W]e have consistently rejected the notion that the constitutional line is marked by a simple mathematical formula, even one that compares actual *and potential* damages to the punitive award.' We decline again to impose a bright-line ratio."

123 S. Ct. at 1524, quoting *BMW*, 517 U.S. at 582 (emphasis in original, citation omitted). *See also TXO*, 509 U.S. at 460 ("this Court [has] eschewed an approach that concentrates entirely on the relationship between actual and punitive damages."). For this reason, the Oregon court was entirely justified in rejecting

Petitioner's proffered jury instruction, *see* Pet. at 9-11, which was also contrary to Oregon law.[6] Pet. at 23a. The court itself considered the relationship between the harm effected and the punitive damages. That analysis entirely satisfied Petitioner's due-process rights.

High ratios between actual and punitive damages may be justified by the facts of a case. In *TXO*, this Court upheld a ratio of punitive to compensatory damages of 526 to one, 509 U.S. at 459, even after an earlier decision of this Court suggested that "an award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety." *State Farm*, 123 S. Ct. at 1524, characterizing *Haslip*, 499 U.S. at 23-24.

Justice Stevens has explained the circumstances warranting a high ratio:

> It is appropriate to consider the magnitude of the potential harm that the defendant's conduct would have caused to its intended victim if the wrongful plan had succeeded, *as well as the possible harm to other victims* that might have resulted if similar future behavior were not deterred.

TXO, 509 U.S. at 460 (emphasis added). Obviously, if those potential harms are taken into account, the compensatory denominator would be higher and the resulting ratio much lower. See *BMW*, 517 U.S. at 581. Philip Morris's efforts to keep its customers smoking

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[6] Under Oregon law, a trial court is not required to give an incorrect jury instruction or to give the correct portions of one which includes error. *Simpson v. Sisters of Charity*, 588 P.2d 4 (Or. 1978). The requested instruction covered three-and-a-half pages, was confusing, and self-contradictory. In raising the jury instruction issue in the Oregon Court of Appeals, Petitioner did not suggest any constitutional infirmity in the trial court's denial of their request. Petitioner should not be permitted to raise it for the first time before this Court.

contributed to the deaths of thousands of Oregonians and potentially threatened many more. Under any calculation of potential harm to punitive damages, the ratio in this case must be viewed as miniscule.

State Farm suggested that "in practice" more punitive awards with single-digit ratios will be found to comport with due process than those with much larger ratios. *State Farm*, 123 S. Ct. at 1524. The Court did not, however, create a blanket presumption that ratios higher than nine to one are grossly excessive in all cases. Indeed, the Court emphasized that "there are no rigid benchmarks" and that the "precise award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff." *Id.* (suggesting that a 500-to-one ratio could also be justified under the proper circumstances); *see also id.* (there is no "bright-line ratio which a punitive damage award cannot exceed").

2. The BMW Guidepost Looks to the Relationship between the Award and the Harm Caused, Not the Compensatory Damages Awarded

Petitioner would prefer that due process be reduced to the simple mathematical exercise of expressing the award as a ratio of punitive damages to the compensatory award. That is not the guidepost established by this Court in *BMW*. Rather, the reviewing court must look at "the disparity between the actual or potential *harm* suffered by the plaintiff and the punitive damages award." *State Farm*, 123 S. Ct. at 1520 (emphasis added).

This Court's decisions addressing the excessiveness of punitive damages under the Due Process clause have all involved economic wrongdoing. In such cases, the amount of compensatory damages provides a convenient measure of the harm visited upon the plaintiff. If Philip Morris had defrauded Jesse Williams of property worth $500,000, then a verdict in that amount plus

consequential damages would accurately represent the "harm" inflicted.

In this case, the harm visited upon Jesse Williams was ultimate and irreplaceable. But the statutory cause of action for wrongful death does not even purport to determine the value of the life taken. Under Oregon's wrongful death statute, as in most states, compensatory damages are based on the monetary losses of decedent's family, such as medical bills, burial costs, and loss of the decedent's economic contribution to the family.[7] *See* ORS § 30.020.

For this reason, it is widely recognized that "[w]rongful death damages fail to compensate for the harm to decedent." A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 941-42 (1998). *See also* William Landes & Richard Posner, THE ECONOMIC STRUCTURE OF TORT LAW 187 (1987)(The measure of recoverable damages "results in a systematic underestimation of damages in wrongful-death cases."). Thus, the amount of compensatory damages awarded in wrongful death cases, such as this one, do not represent the extent of the harm caused by the defendant, but merely the monetary loss to the surviving family. Nor can it be said that the compensatory damages awarded in this case were "substantial" or "complete compensation" for the life that was taken.[8] *Compare, State Farm*, 123 S. Ct. at 1524.

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[7] In Oregon, the surviving spouse and children are also entitled to noneconomic damages for loss of the "society, companionship and services of the decedent." ORS § 30.020(2)(d). That recovery, however, is limited to a maximum of $500,000 regardless of the amount the jury determines is necessary to compensate for those losses and regardless of the number of survivors. ORS § 18.560

[8] Studies attempting to place a monetary value on the loss of life have arrived at estimates ranging from $3-$7 million. W. Kip Viscusi, *The Social Costs of Punitive Damages Against Corporations In*

Even if the Court were inclined to tie punitive damages more closely to compensatory damages, a wrongful death case such as this one is an especially poor vehicle to do so. Fewer than half the states permit punitive damages in wrongful death cases. 1 John J. Kircher & Christine M. Wiseman, PUNITIVE DAMAGES: LAW AND PRACTICE § 5.10 (2d ed. 2000). As one commentator has noted, "[w]rongful death is an area of the law in which the measurement of loss in pecuniary terms presents intractable difficulties." Dorsey D. Ellis, Jr., *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1, 30 n.140 (1982). A scholar who found a general correlation in awards between punitive and compensatory damages also discovered that "[t]he one exception to that pattern was in wrongful death cases." Michael L. Rustad, *In Defense of Punitive Damages in Proaucts Liability: Testing Tort Anecdotes with Empirical Data*, 79 IOWA L. REV. 1, 64 (1992).

Even scholars who advocate complete abolition of punitive damages acknowledge that wrongful death cases present an atypical situation of systematically low compensatory awards where punitive damages might be "needed to create adequate deterrence." Viscusi, *supra*, 87 GEO. L.J. at 334. For this reason, a wrongful death case presents a poor vehicle for this Court to establish a more rigid rule based on ratio.

An additional difficulty is that, because compensatory wrongful death damages largely reflect the financial contribution of the decedent, awards for the wrongful death of a child or a nonworking spouse are comparatively low. Polinsky & Shavell, *supra*, 111 HARV. L. REV. at 941 n.229. Consequently, the constitutional presumption urged by Petitioner amounts to a presumption that, as a matter of law, the wrongdoer who

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Environmental and Safety Torts, 87 GEO. L.J. 285, 314 (1998). "Court awards for compensatory damages after fatalities are typically well below that amount." *Id.*

kills a child or nonworking spouse is less deserving of punishment or deterrence than one who kills a healthy wage earner. The same rule of law would deem it more important to punish and deter misconduct that kills a rich person than a poor one. That such a rule of inequality should be read into the Fourteenth Amendment is particularly offensive.

D. The Oregon Court's Application of the "Other Penalties" Guidepost Does Not Conflict With *State Farm*

The third BMW guidepost is the comparison of the punitive award with the "civil or criminal penalties that could be imposed for comparable misconduct." *BMW*, 517 U.S. at 583. Philip Morris implicitly concedes that the Oregon Court of Appeals properly applied this guidepost. The company assigned no error concerning this issue in its petition to the Oregon Supreme Court or in its Petition to this Court.

The Oregon court accurately prefigured this Court's reluctance in *State Farm* to use criminal penalties — in this case state statutory penalties for manslaughter — for comparison with the amount of a punitive award. *Compare* Pet. at 32a *with* 123 S. Ct. at 1526.[9] As a matter

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[9] However, the Court did allow that the "existence of a criminal penalty does have bearing on the seriousness with which a State views the wrongful action." *Id.* at 1526. Still, it should not require an act of the legislature to place defendants on notice that the State views misconduct that causes the deaths of its citizens as a serious matter.

Prosecutions of corporations for manslaughter or negligent homicide, while not commonplace, are increasing. *See* Annot., "Corporation's Criminal Liability for Homicide," 45 A.L.R.4th 1021, at § 2(a) (1986)("the trend seems to be toward" subjecting corporations to criminal liability for homicide).

In Oregon, following a contrary ruling in *State v. Pacific Powder Co.*, 226 Or. 502, 360 P.2d 530 (1961), the legislature enacted ORS § 161.015, which expressly includes a public and private corporation within the definition of "person" subject to criminal liability.

of state law, the court below found no applicable civil penalties.

The Oregon Court stated instead that the standards established by the Oregon legislature, including ORS § 30.925(2),[10] gave adequate notice "sufficient to alert defendant to the possible punishment for its fraudulent scheme." Pet. at 32a. After a careful review of the evidence, the court concluded that the jury award satisfied the statutory criteria. Pet. at 27a-28a.

This Court has stated that a punitive damage award that complies with fair procedures under state law "is entitled to a strong presumption of validity." *TXO*, 509 U.S. at 457; *BMW*, 517 U.S. at 586-87 (Breyer, J., concurring). That presumption should be even stronger in

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[10] Punitive damages, if any, shall be determined and awarded based upon the following criteria:

(a) The likelihood at the time that serious harm would arise from the defendant's misconduct;

(b) The degree of the defendant's awareness of that likelihood;

(c) The profitability of the defendant's misconduct;

(d) The duration of the misconduct and any concealment of it;

(e) The attitude and conduct of the defendant upon discovery of the misconduct;

(f) The financial condition of the defendant; and

(g) The total deterrent effect of other punishment imposed upon the defendant as a result of the misconduct, including, but not limited to, punitive damage awards to persons in situations similar to the claimant's and the severity of criminal penalties to which the defendant has been or may be subjected.

ORS § 30.925 (2).

Philip Morris was also afforded the protections of ORS § 18.537, which requires proof by clear and convincing evidence, court determination that a punitive award "is within the range of damages that a rational juror would be entitled to award based on the record as a whole," and reduction of punitive awards, where appropriate, based on remedial measures and previous judgments for punitive damages against the same defendant for the same conduct. Pet. at 18a.

this case, reflecting the "substantial deference" owed to legislative judgments concerning appropriate sanctions. *BMW*, 517 U.S. at 583.

E. The Oregon Court Did Not Impermissibly Use Wealth to Justify the Size of the Award

Petitioner also attempts to find conflict with *State Farm's* admonition that a defendant's wealth "cannot justify an otherwise unconstitutional punitive damages award." Pet. at 9. Surely Petitioner cannot be suggesting that the award is flawed because evidence of Philip Morris's wealth went before the jury. This Court acknowledged the propriety of such evidence, *State Farm*, 123 S. Ct. at 1525, citing with approval *BMW*, 517 U.S. at 591 (Breyer, J., concurring)(introduction of defendant's wealth is not "unlawful or inappropriate"), and Oregon law specifically permits it. See ORS § 30.925(2).

Instead, Petitioner apparently claims the Oregon court used wealth to justify the size of the award. In doing so, Petitioner conflates wealth with profit. The Oregon court of appeals specifically found that "the jury could have . . . believed, in light of *defendant's profits*, that only a large award would be proportionate to the harm the defendant caused." Pet. at 31a-32a (emphasis added and footnote omitted). Such a reference point is entirely proper, and nothing in *State Farm* suggests otherwise. *Compare Haslip*, 499 U.S. at 22 (approving a state punitive-damage standard that examined "the profitability to the defendant of the wrongful conduct and the desirability of removing that profit"). Because *State Farm* provides no grounds upon which to find error in the Oregon court's consideration of the profitable character of Petitioner's fraud, there is no basis for remand or further review.

II. OREGON'S "RATIONAL JUROR" STANDARD COMPORTS WITH DUE PROCESS

Petitioner argues that Oregon's rational juror standard for review of the evidence supporting a punitive damage judgment is somehow defective under federal precedent. Pet. at 13. Here, as elsewhere, Petitioner's imagination has outrun reality. Rather than condemn the "rational juror" standard, this Court repeatedly has endorsed it.

After this Court, in *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994), required Oregon to provide judicial review of punitive damages for excessiveness, the Oregon Supreme Court held that that such awards will "not be disturbed when it is within the range that a rational juror would be entitled to award in the light of the record as a whole." *Oberg v. Honda Motor Co.*, 888 P.2d 8, 10 (Or.), *cert. denied*, 517 U.S. 1219 (1996). This standard was subsequently codified by the Oregon legislature. ORS § 18.537. In adopting the "rational juror" standard, Oregon was not writing on a blank slate. In the federal *Oberg* decision, this Court found no defect in the use of "different verbal formulations" of the standard of review because:

> There may not be much practical difference between review that focuses on "passion and prejudice," "gross excessiveness," or whether the verdict was "against the great weight of the evidence." All these may be rough equivalents of the standard this Court articulated in *Jackson v. Virginia*, [443 U.S. 307, 324 (1979)](whether "*no rational trier of fact* could have" reached the same verdict).

512 U.S. at 432 n.10 (emphasis added). It is clear, then, that the "rational juror" standard and *BMW's* "grossly excessive" standard are utterly compatible.

Federal courts utilize the "rational juror" standard in both criminal and civil matters. *Anderson v. Liberty*

Lobby, Inc., 477 U.S. 242, 252 (1986). Courts apply the standard whether reviewing asserted errors where proof must be beyond a reasonable doubt, clear and convincing or by preponderance of the evidence. *Id.* Punitive damages pose no unique problem that requires departure from this familiar and stringent standard.

This Court's recent punitive damage jurisprudence represents no departure from these earlier holdings.

Moreover, this Court has recognized that the Oregon Constitution accords the jury, even in punitive damage cases, authority to set damages and found that this status "compel[s] the treatment of punitive damages as covered [by the right to a jury trial]". *Cooper Indus. Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 437 n.10 (2001). Respect for state authority should compel this Court to defer to Oregon's standard, which does not violate due process, and which supplements but does not replace the *de novo* application of the *BMW* guideposts. The court below engaged in precisely that *de novo* examination following its state law analysis. Pet. at 28a-33a. *See also State v. Rogers*, P.3d 1261, 1278 n.8 (2000)(appellate courts review legal questions "anew and without deference to the decisions of trial courts"). The *Cooper* decision does not require Oregon to abandon its respect for jury findings. Even under the lesser jury trial standard available under the Federal Constitution, this Court said:

> [N]othing in our decision today suggest that the Seventh Amendment would permit a court, in reviewing a punitive damages award, to disregard such jury findings [as are relevant to determining a punitive verdict.]

Cooper Indus., 532 U.S. at 439 n.12.

Petitioner attempts to evade these holdings by transmogrifying the "rational juror" standard into the "rational basis" test. Like alchemists of old, their claim should be rejected. The rational basis test is a highly

deferential test that forbids only utterly arbitrary decisions and permits the Court to imagine a legitimate rationale, unanchored by "evidence or empirical data," in order to withstand a due process challenge. *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993). The "rational juror" standard, however, requires a court to examine the actual evidence and determine its sufficiency. *See Jackson*, 433 U.S. at 314-15, 324 (comparing "rational juror" as a more stringent standard with the arbitrariness of "any evidence"). *See also State v. Harris*, 609 P.2d 798 (1980)(finding federally mandated "rational juror" standard more stringent than "no evidence" rule set forth in Or. Const. Art. VII (amended), § 3).

The rational juror rule satisfies due process and sufficiently assures, in combination with the *BMW* guideposts, that "punitive damages are reasonable in their amount and rational in light of their purpose to punish what has occurred and to deter its repetition." *Haslip*, 499 U.S. at 20-21.

III. PETITIONER RAISES NO FEDERAL QUESTION REGARDING PREEMPTION, AN ISSUE IT WAIVED BELOW

A. Petitioner Did Not Raise Preemption on Appeal

Philip Morris contends that the Oregon Court of Appeals "based its affirmance of the punitive award in part on conduct for which liability is preempted by federal law." Pet. at 15.[11] Any issue Philip Morris has that devolves from preemption was waived below. After the trial, Philip Morris asserted that *"[t]he trial court agreed with Philip Morris' position on preemption."* Reply Br. in Or. Court of Appeals, at 3 (emphasis in original). That

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[11] Petitioner offers no argument that the lower court's reliance "in part" on an erroneous basis was so prejudicial as to warrant reversal.

position was that fraudulent concealment was preempted even if affirmative misrepresentations were not. Pet. at 6a-7a.

As the court of appeals noted, neither party on appeal challenged the trial court's ruling regarding the effect of 15 U.S.C. § 1331. Pet. at 7a. Indeed, Philip Morris asserted to the Oregon Court of Appeals:

> Philip Morris does not challenge the trial court's preemption rulings. . . . The trial court twice granted Philip Morris summary judgment motions on preemption. . . . The law of preemption (and the trial court's preemption rulings) required plaintiff to prove that Williams relied upon an affirmative misrepresentation.

Reply Br. of Philip Morris in the Or. Court of Appeals, at 3. Before the Oregon Court of Appeals, Philip Morris simply did not present any error concerning federal preemption. Instead, it merely challenged the sufficiency of the evidence that "it made any representation to Williams or that Williams relied on any representation that it may have made." Pet. at 7a (emphasis in original).

Oregon appellate rules require that error be assigned on appeal or the claimed basis for reversal is waived. OR. R. APP. P. 5.45. Federal law is the same. *See, e.g., Boyd v. Ford Motor Co.*, 948 F.2d 283, 284 (6th Cir. 1991)(any issues not assigned "are considered abandoned on appeal and thus not reviewable"). Philip Morris failed to preserve any preemption issue that might exist.

B. The Ruling below Conforms to this Court's *Cipollone* Decision

Even if this Court were inclined to review this issue, the lower court's ruling falls squarely within this Court's holding in *Cipollone v. Liggett Group, Inc*, 505 U.S. 504 (1992), that state causes of action based on affirmative misrepresentations are not preempted by the Federal

Cigarette Labeling and Advertising Act, 15 U.S.C. § 1331 *et seq.*

A plurality of the Court in *Cipollone* held that the Act, as amended in 1969, preempts state product liability actions that are based on the cigarette maker's failure to warn beyond the congressionally mandated label warnings. On the other hand, the Court held, a cause of action alleging intentional fraud and misrepresentation, both by "false representation of a material fact [and by] conceal[ment of] a material fact," is not preempted. 505 U.S. at 528. The Court explained that, "petitioner's fraudulent-misrepresentation claims . . . are predicated not on a duty 'based on smoking and health' but rather on a more general obligation, the duty not to deceive." 505 U.S. at 528-29.

On Philip Morris's motion for summary judgment, and in conformity with *Cipollone*, the trial court dismissed plaintiff's claims "to the extent they were based upon (1) failure to warn, (2) a claim that Philip Morris neutralized the warnings given, or (3) a claim that Philip Morris had fraudulently concealed information concerning smoking and health." Rather, plaintiff was limited to allegations of affirmative misrepresentations. Pet. at 6a.

The jury found, based on the evidence that Jesse Williams did indeed rely on defendant's affirmative misrepresentations. In its verdict, the jury was asked:

> Did defendant make false representations concerning the causal link between smoking and cancer upon which Jesse Williams relied, and if so, were such false representations and reliance a cause of damage to plaintiff, as to cigarettes sold to Jesse Williams on or after September 1, 1988?

Pet. at 10a n.8. The jury answered, "Yes." *Id.*

C. Petitioner's Preemption Argument Merely Challenges the Sufficiency of the Evidence Supporting the Fraud Claim

The Petition raises no federal question regarding preemption. Rather, Petitioner's argument amounts to no more than its assertion that there was insufficient evidence as a matter of state law to support the jury's finding that Jesse Williams relied on defendant's affirmative misrepresentation. For example, Petitioner relies on *Allgood v. R.J. Reynolds Tobacco Co.*, 80 F.3d 168, 171-72 (5th Cir. 1996), where the court upheld summary judgment against plaintiff on her fraudulent misrepresentation claim, finding that the evidence of reliance on the misrepresentations was insufficient as a matter of law. By contrast, the Oregon Court of Appeals in this case found sufficient evidence to support the jury's verdict. Pet. at 17a.

To fit within that case, Petitioner mischaracterizes plaintiff's claim as based on the "false impression" theory. Pet. at 16. The court below properly rejected that characterization. Pet. at 9a. Obviously, every fraudulent misrepresentation attempts to create a false impression.

Even if this Court were inclined to inquire into the evidence supporting the jury's finding, it need look no further than Petitioner's own statements. Philip Morris conceded below that it had issued 14 statements concerning smoking and health, seven of which were reported in newspapers, magazines or on television. Pet. for Review in the Or. Supreme Court, at 7. Significantly, it also argued:

> [A]ny misstatements by Philip Morris had the potential to affect only a subset of Oregon smokers — those who clung to Philip Morris' few public statements related to smoking and cancer, while at the same time ignoring the vast amount of information about the dangers of smoking. In fact,

> the record contains evidence of only one such smoker – Jesse Williams."

Reply Br. in the Oregon Court of Appeals, at 13.

Because the Petitioner raises no substantial federal question regarding preemption the Petition should be denied.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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